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IN THE

Supreme Court of the United States

October Term, 1954

JACK HAZELCORN,

Petitioner,

—against—

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming petitioner's conviction of conspiracy, in the vicinity of New York, to transport a stolen automobile in interstate commerce from New York to Miami, Florida, and a further conspiracy, in the vicinity of Miami, Florida, to transport the same automobile in foreign commerce from Miami, Florida, to Havana, Cuba.

Opinion Below

The opinion of the Court of Appeals (R. 533) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 29, 1954 (R. 540). A petition for a rehearing

was denied by the Court of Appeals on February 18, 1955 (R. 545). On March 15, 1955, by order of Mr. Justice Hugo L. Black, the time within which to file this petition for a writ of certiorari was extended to and including April 4, 1955. The jurisdiction of this Court is invoked under Title 28, U. S. C., 1254(1); see also Rules 37(b)(2) and 45(a), F. R. Crim. P.

Questions Presented

1. Whether Congress, when it amended §3052, Title 18, U. S. C. on January 10, 1951, intended to confer upon agents of the Federal Bureau of Investigation the power to make an arrest without a warrant under any circumstances where a reasonable ground for belief of guilt of a felony against the United States exists but where no emergency or urgent situation confronts the arresting agent.

2. Whether, without a warrant of arrest having been issued, reasonable grounds for belief of guilt existed to justify an arrest and a search primarily based upon a telephone call from a Special Agent in Florida to the arresting Special Agent in New York that an alleged co-conspirator whom he arrested that evening, told him petitioner "had rode down in the car (stolen) with him to Florida."

3. Whether, without a warrant of arrest having been issued, the request of Special Agents of the Federal Bureau of Investigation to petitioner to accompany them to Federal Bureau of Investigation Headquarters for questioning, despite petitioner's desire to answer questions at his private residence, and where, after petitioner refused to

answer questions at Federal Bureau of Investigation Headquarters, he was nevertheless "held" there, without his consent, although not verbally designated an arrest by the Agents, nevertheless constituted an arrest, without "probable cause", vitiating the subsequent search of petitioner's person and seizure of incriminating documents.

4. Whether the erroneous admission of damaging and prejudicial statements of co-conspirators Randall and Brodsky against petitioner made after their arrest to Special Agent Bailey was cured three days thereafter by a partial instruction to the jury in the trial court's general charge.

Statutes Involved

See Appendix:

§3052, Title 18, U. S. C.
§371, Title 18, U. S. C.
§2312, Title 18, U. S. C.
Amendment IV to the Constitution of the United States.

Statement

On May 6, 1950, in the United States District Court, Southern District of Florida at Miami, petitioner was indicted, together with Robert Randall alias Robert White, and Jerome Brodsky, in six counts, only two of which, namely Counts 4 and 6, are at issue here. Petitioner was acquitted on the remaining counts by judgment of acquittal as to Counts 2 and 5 at the end of the Government's case and directed verdicts as to Counts 1 and 3, the reasons for which appear in the trial court's charge to the jury

(R. 501-503). Count 4 charged a conspiracy on March 30, 1953 in the vicinity of New York City to violate §2312, Title 18, U. S. C. in that defendants agreed to transport in interstate commerce a stolen car from New York City to Miami, Florida (R. 2-3). Count 6 charged a similar conspiracy, but a transportation in foreign commerce from Miami, Florida, to Havana, Cuba (R. 5-6). Petitioner was found guilty and was sentenced to imprisonment on October 30, 1953 for a period of two years on Counts 4 and 6 to run concurrently (R. 36). The Court of Appeals affirmed the judgment of conviction on both Counts 4 and 6 (R. 540).

The Pertinent Facts

On April 10, 1953 Special Agents of the Federal Bureau of Investigation John W. Dyer and Gerard Van Lewen visited the private residence of petitioner in the Borough of Brooklyn, New York City, at approximately 8:00 o'clock in the evening[1] (R. 352-353). Said Special Agents at that time had information in their possession (but from whom it does not appear) that a phone call had been made from Havana, Cuba, to petitioner's residence, and that a money order was subsequently sent in the name of petitioner's wife, Doris Hazelcorn, to one Bob White at Havana, Cuba (R. 353). This was all the information Agents Dyer and Van Lewen had (R. 353). The Agents were merely making an "inquiry" (R. 353). Special Agent Dyer told petitioner that he wanted to talk with him at the Federal Bureau of Investigation Headquarters in the Borough of Man-

1 The steps leading up to and including the arrest set forth hereinabove are based on the testimony of Special Agent Dyer, although petitioner's testimony in this regard is in sharp conflict (R. 363-365).

hattan, New York City, in connection with an official investigation he was conducting, and would like him to accompany them to the Federal Bureau of Investigation Headquarters (R. 353). Petitioner requested that such questioning take place in his home (R. 353). Special Agent Dyer stated to petitioner that the Agent's investigative files were down at the Federal Bureau of Investigation Headquarters, and that he would like to have him questioned there (R. 353-354). Dyer testified that petitioner voluntarily went with him to Federal Bureau of Investigation Headquarters (R. 355). Petitioner refused to answer any questions at the Federal Bureau of Investigation Headquarters (R. 357). Approximately 9:45 P.M. or 10:00 P.M. that evening, Special Agent Dyer called Special Agent Bailey in Florida, and advised him that petitioner had been located at his residence in Brooklyn, that he was then in the Federal Bureau of Investigation office, that he had been questioned, and that he had refused to answer any questions whatsoever (R. 357). Special Agent Bailey told Agent Dyer that Randall " * * * already told him that Jack Hazelcorn had rode down in the car with him to Florida" (R. 357).[2] Special Agent Bailey further told Special Agent Dyer that Bailey was going to present the case to the United States Attorney in Florida and would call him back (R. 357).[3] Although Special Agent Bailey

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2 Nowhere does it appear that on April 10, 1953 Special Agent Dyer knew Robert White was an alias of Randall. Indeed, on the contrary, even after the events of April 10, 1953 and as late as July, 1953, Agent Dyer was attempting to locate and identify Bob White (R. 343-345).

3 Agent Bailey had arrested Randall and Brodsky at 6:45 P.M. on April 10, 1953 when they arrived at Miami from Cuba (R. 250). It is to be noted that petitioner was then in his home in Brooklyn, N. Y.

did not tell Special Agent Dyer to hold petitioner at Federal Bureau of Investigation Headquarters, Special Agent Dyer nevertheless interpreted Agent Bailey's conversation as requiring him to hold petitioner there to await any further action in Florida (R. 358). In the same conversation that Special Agent Dyer had with Special Agent Bailey, Dyer stated that he had not yet gotten a complete description of the "Jack Hazelcorn" allegedly involved in the Florida transaction (R. 359). Some time later that evening, and while petitioner was "held" at Federal Bureau of Investigation Headquarters, Special Agent Bailey called Special Agent Dyer from Florida and advised him that the United States Attorney had authorized filing a complaint against Jack Hazelcorn (R. 359). It was after that that Special Agent Dyer "formally" arrested petitioner (R. 359). Immediately thereafter, Special Agent Dyer searched petitioner (R. 347, 367-368) and found a copy of a telegram to one Jerome Brodsky (Gov't. Ex. 29), a courtesy card of the Secomber Hotel in Miami, Florida (Gov't. Ex. 30), and an address of Albert's Motel in Miami, Florida (Gov't. Ex. 31). The complaint and the warrant of arrest issued against petitioner were issued April 11, 1953, a day after the aforesaid arrest (R. 365, Def. Ex. 2 for identification).

Upon the trial of the action the petitioner objected to the introduction of any evidence seized from petitioner by Special Agent Dyer on the ground that the petitioner's initial detention was an unlawful arrest (R. 360), and also, the subsequent "formal" arrest was unlawful because it was not based upon a reasonable belief that petitioner had committed a felony against the United States (R. 358), and furthermore, that the search incident thereto

was illegal (R. 349). The court then excused the jury[4] (R. 352) and took testimony on the motion to suppress the evidence.

In addition to what has already been set forth hereinabove, Special Agent Dyer indicated that he knew, although at what time on April 10th he does not state, "that the car was a stolen car and there was a forged registration for the car" (R. 360); *Special Agent Dyer conceded, however, that he did not have any evidence connecting petitioner with the stolen car or the forged registration* (R. 360), *and conceded further that "an innocent person can easily ride in a stolen car without being a culprit"* (R. 360). The trial court denied the motion on the ground that it was not necessary for the Special Agent to have had reasonable grounds in believing that petitioner Hazelcorn had committed a felony, but rather that, "The question is whether or not the information was reasonably calculated to indicate that he (petitioner) might have committed a felony" (R. 358).

Subsequently, the documents seized from petitioner at the time of his arrest (Gov't. Exs. 29, 30 and 31) were introduced in evidence at the trial over the objection of the petitioner (R. 366).

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4 Unfortunately, all of the circumstances as to how petitioner was brought to Federal Bureau of Investigation Headquarters by Special Agent Dyer; his refusal to answer questions; the arrest by Special Agent Dyer; the search of petitioner; were testified to before the jury before petitioner's counsel was aware of the illegal arrest and search and before the formal hearing on the motion to suppress was held in the absence of the jury (R. 343-351). The court made no direction to the jury to disregard the events which led up to the introduction of the documents seized from petitioner.

During the course of the trial, Special Agent Bailey of the Federal Bureau of Investigation was permitted to testify over objection by petitioner as to admissions made to him by defendants Randall and Brodsky, after their arrest on April 10, 1953 (R. 257). The trial court's reasoning appears at R. 253-254. In addition to admissions made by defendant Brodsky (R. 257-258), Special Agent Bailey testified that defendant Randall told him that he bought the stolen automobile in New York City under the name of Robert White, that petitioner left New York with him on or about April 1, 1953, and drove with him to Miami in the car, that petitioner had registered with him at the Secomber Hotel under the alias Jack Parker (R. 260-261). Petitioner moved for a mistrial which was denied (R. 292, 465). Petitioner renewed his motion for a mistrial at the close of the Government's case (R. 409), and renewed it again when both sides rested (R. 465), which motion was denied by the court (R. 465).

Approximately three days after the introduction of this evidence, the trial court, in his general charge to the jury, stated with regard to the aforesaid testimony of Special Agent Bailey as to Count 4 and further as to the effect of the same testimony on Count 6 as follows:

> "In this connection the Court wishes to at this time instruct the jury on the issue of whether the defendant Hazelcorn was guilty of the conspiracy charged, that you should disregard and accord no probative force to the testimony of the Government witness Bailey that the accused Randell made a statement to him, Bailey, that Hazelcorn accompanied him, Randell, on the trip from New York to Miami, since it is the law that acts and declarations

of co-conspirators are not admissible against the other members of the conspiracy after the termination of the conspiracy itself.

"In other words, the jury could not consider this testimony upon the issue of whether there was in fact a conspiracy between Randell and Hazelcorn or whether there was an overt act in pursuant of such conspiracy since the conspiracy, if any there was, was terminated when the defendant Randell was arrested and the object of the conspiracy, if any, was thereby necessarily terminated; * * * (R. 505-506).

"The Court instructs you that such testimony of the Government witness Bailey as bears upon statements made by the defendant Brodsky and the defendant Randell at the time of their arrest the jury would not be authorized to, and you are instructed not to, consider or give any probative force to any statement made by either of said accused to the witness Bailey in the absence of the other accused, either on the substantive offense charged in Count 3 or the conspiracy charge in Count 6" (R. 511).

The Court of Appeals held the arrest and subsequent search of petitioner valid, citing, "Brubaker v. United States, 188 F. 2d 894; United States v. Bell, 48 F. S. 986". The Court of Appeals made no mention of the alleged error of the trial court as to the prejudice created by the inadmissible statements of the co-conspirators after their arrest.

Reasons for Granting the Writ

The decision of the court below in upholding the arrest and search of petitioner without a warrant extends the power of agents of the Federal Bureau of Investigation to

make arrests without a warrant beyond the authority intended to be conferred by the Congress in its amendment of §3052, Title 18, U. S. C. (January 10, 1951). This Court has yet to pass upon this question under the amended statute; but, from its prior decisions on related statutes governing the power of law enforcement agents to make arrests without a warrant where reasonable belief of guilt is apparent, it would seem that the decision of the court below represents a great departure from the principles there announced. See *United States* v. *Di Re*, 332 U. S. 581; *Brinegar* v. *United States*, 338 U. S. 160. Furthermore, the court's implied sanction of the action of the trial court in attempting three days later to cure the error he committed by allowing into evidence damaging and prejudicial statements of co-conspirators made after their arrest would seem to be contrary to decisions of other Circuit Courts interpreting the same situation, as well as opposed to the views already expressed by this Court in *Krulewitch* v. *United States*, 336 U. S. 440.

The issues thus present important questions in the administration of the criminal law, which it is respectfully submitted should be decided.

1. Congress amended §3052, Title 18, U. S. C. on January 10, 1951 by eliminating the additional requirement for an arrest by agents of the Federal Bureau of Investigation without a warrant that there be a likelihood of an escape before a warrant of arrest can be obtained. This amendment was enacted as a result of the decision in *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir.), cert. den. by this Court in 342 U. S. 920.[5] It was clearly not intended, how-

5 House Report Committee on Judiciary, 1950 U. S. Code Cong. Service, p. 4322.

ever, that even where "probable cause" existed, an arrest without a warrant was to be sanctioned under all circumstances.[6]

Congress did not intend to confer any greater power upon the agents of the Federal Bureau of Investigation than was conferred on private persons or other law enforcement officers of the United States Government. Consequently, some emergency or urgent situation was required as a necessary factor in addition to "probable cause" in determining the validity of an arrest without a warrant. Cf. *Conte* v. *United States*, 215 F. 2d 324, 327 (C. A. D. C., 1954).[7] This Court applied this same principle to invalidate a search without a search warrant even though incident to a lawful arrest in *Trupiano* v. *United States*, 334 U. S. 699, 708.

Thus, even though we were to assume reasonable grounds existed for the arrest of petitioner without a warrant having been issued, the court below failed to consider the lack of any evidence whatever for the need of a "spot" arrest and "spot" search. There was no urgency of any kind to justify Agent Dyer in arresting petitioner before

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6 The statement of the Acting Deputy Attorney General to the Speaker of the House of Representatives, dated June 27, 1950, indicates that the power to arrest without a warrant should be granted to agents of the Federal Bureau of Investigation in urgent and emergency situations without regard to the element of escape. The need for this was particularly emphasized in crimes such as espionage and security, where individuals are not likely to flee if they are persons of standing. 1950 U. S. Code Cong. Serv. p. 4323.

7 "Moreover, there was not the slightest need of arresting her without a warrant even if there had been danger that she might run away and hide * * *. No sudden emergency forced the act of the agents; * * *." *United States* v. *Coplon*, 185 F. 2d 629, 635 (2d Cir.), cert. den. 342 U. S. 920.

the actual warrant of arrest had been issued the following day. In failing to consider this essential fact, the court below disregarded an important element under §3052, Title 18, U. S. C. in determining the legality of the arrest. It is evident from its opinion that the court below sanctioned the search because it deemed the arrest lawful.

Such a holding of the court below, if left unchallenged, will permit unrestrained arrests without a warrant under this statute wherever the agents of the Federal Bureau of Investigation believe that reasonable belief exists that a person has committed a felony against the United States. The situations will be multiplied if for no other reason than to permit a "spot" search allegedly incidental to a "lawful" arrest.

2. Petitioner, however, was arrested without any reasonable belief by Agent Dyer that he was guilty of a felony against the United States. Agent Dyer conceded that fact when he stated he had no evidence to connect petitioner with the stolen car or the forged registration (R. 360). Certainly, the information he received from Special Agent Bailey in the evening of April 10, 1953 that petitioner rode in the car with Randall from New York to Miami can scarcely be sufficient to justify the court below in finding a reasonable belief of participation in conspiracy in view of this Court's holding in *United States* v. *Di Re*, 332 U. S. 581, 593.[8] The court below was clearly in error,

8 In *United States* v. *Physic*, 175 F. 2d 338, 339 (2d Cir.), the Court of Appeals upheld the arrest and subsequent search based solely upon hearsay (although "hesitantly" in view of this Court's opinion in *United States* v. *Di Re*, 332 U. S. 581), provided the hearsay came from the arresting officer's superior. (Footnote 3 at page 339.) In the instant case, Agent Bailey was not superior to Agent Dyer but apparently on an equal

particularly so where Agent Dyer admitted that "an innocent person can easily ride in a stolen car without being a culprit" (R. 360).[9] Indeed, this Court has held that even being present at a crime is not evidence of guilt as an aider or abettor. *United States* v. *Williams,* 341 U. S. 58, 64.

That the United States Attorney authorized the filing of a complaint against petitioner, as reported by Agent Bailey on the telephone to Agent Dyer on April 10, 1953 (R. 359), a fact relied upon by the court below, clearly did not remove the taint of the prior illegal arrest, nor did it add support for reasonable belief that petitioner was guilty of a felony. Cf. *Weinberg* v. *United States,* 126 F. 2d 1004, 1008 (2d Cir.), wherein the Court of Appeals in a somewhat different situation, but nevertheless appropriate, held that the Federal Bureau of Investigation is merely an aid to the United States Attorney in the prosecution and detection of crime, and that the Department of

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footing. Moreover, Agent Dyer's information upon which the lower court found "probable cause" for the arrest was based upon pure hearsay. This Court, in *Brinegar* v. *United States,* 338 U. S. 160, gave no comfort to the lower court's decision upholding the arrest and search on pure hearsay.

9 *Brubaker* v. *United States,* 183 F. 2d 894 relied upon by the court below involved a person who was the driver of a stolen car, not a passenger; a warrant of arrest had already been issued in the case, apparently for the passenger of the car who was a notorious car thief and a receiver of stolen cars. See 37 Virginia Law Review 611. In *United States* v. *Bell,* 48 F. S. 986, also relied upon by the court below, secret indictments had already been filed and warrants of arrest had been issued prior to the arrest. In the instant case, petitioner had no record nor did Randall with whom he allegedly rode from New York to Miami, nor was there any prior fact known to the arresting agents that petitioner or Randall were known as criminals or suspected criminals at least in the trial record below.

Justice, including the Federal Bureau of Investigation, is an overall administrative agency for this purpose. Obviously, the United States Attorney could not by his official cloak hide an illegal act of the Federal Bureau of Investigation, as was held in that case, or alter and change the character of an unlawful arrest without a warrant, merely by authorizing the issuance of a complaint.

3. An important question, moreover, in the administration of criminal justice is whether petitioner was arrested before Agent Dyer used the formal language that he placed petitioner under arrest. If so, everything which flowed from the unlawful detention, including the subsequent search, would be illegal. *Nardone* v. *United States,* 302 U. S. 379, and 308 U. S. 338. Special Agent Dyer admitted that he "held" petitioner at Federal Bureau of Investigation Headquarters in New York City until he heard from Agent Bailey that a complaint would be authorized (R. 358).[10] However, he contended that petitioner accompanied him to Federal Bureau of Investigation Headquarters voluntarily (R. 355). This fact would seem to be completely refuted by petitioner's refusal to answer questions, a circumstance the trial court disregarded entirely (R. 361). See *United States* v. *Di Re,* 332 U. S. 581, 595, where this Court held under a similar claim by the Government

10 It is to be noted that Agent Dyer "held" petitioner even prior thereto; for he kept him there while he called Agent Bailey in Florida to find out what to do with petitioner. Up to that point, he had no information whatsoever to connect petitioner with Randall or Brodsky, or the stolen car, even by "association". The call from Havana was meaningless. The money sent by petitioner's wife to Bob White in Cuba was likewise meaningless, for on April 10, 1953 Agent Dyer had no knowledge that White and Randall were the same. He was still checking to identify Bob White as late as July 19, 1953 (R. 343-345).

that "probable cause cannot be found from submissiveness".

We believe the proper rule to be that where, because of official position law enforcement officers induce a person to accompany them to Federal Bureau of Investigation Headquarters, and against that person's will, subject him to questioning, and restrain his freedom by "holding" him there, such action constitutes an arrest regardless whether the agent of the Government says the words, "you are under arrest", or says nothing.[11] To hold otherwise, as did the lower court, is to afford too much discretion to law enforcement officers in the absence of the issuance of a warrant of arrest to say when they did or did not place a person under arrest in order to validate a search.[12] The enforcement of such a rule, which we suggest is the proper one, would be particularly salutary and be subject to the restraint upon searches even incidental to a lawful arrest imposed by this Court in *Trupiano* v. *United States*, 334 U. S. 699, 708.

4. This Court had occasion to reverse a conviction in *Krulewitch* v. *United States*, 336 U. S. 440, wherein Mr.

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11 The trial court seemed to place much emphasis upon the fact that Agent Dyer had not told petitioner he was under arrest while he was holding him (R. 360-361). We believe the dissenting opinion in *Gilliam* v. *United States*, 189 F. 2d 321, 327 (6th Cir.) states the correct rule. The majority held the stopping of the automobile did not constitute an arrest. However, *Morton* v. *United States*, 147 F. 2d 28 (C. A. D. C.) is contrary.

12 See *Morton* v. *United States*, 147 F. 2d 28 (C. A. D. C.), where the court, in order to validate the search, agreed that an arrest occurred under facts almost identical to the instant case, whereas in *Gilliam* v. *United States*, 189 F. 2d 321 (6th Cir.), the court held the detention not an arrest to prevent the application of the rule that would invalidate anything which occurred thereafter, including the search.

Justice Black speaking for the majority indicated that this Court could not find from the record before it that no prejudice resulted from the error committed by the trial court in admitting evidence, despite the trial court's attempt to cure the error in his instructions to the jury.[13]

The present situation presents a clear departure from the decisions of this Court and is clearly in conflict with the Circuit Court decisions cited in footnote 13. It is evident that the trial court not only waited three days until the jury was saturated with the damaging inadmissible statements of co-conspirators Randall and Brodsky, but further, he emphasized the error and created greater confusion by instructing the jury to disregard only one particular statement of co-conspirator Randall made to Special Agent Bailey (R. 505). The trial court told the jury on the question of whether the petitioner was guilty of the conspiracy charged in Count 4 that the statements of co-conspirator Randall to Agent Bailey that petitioner accompanied Randall on the trip from New York to Miami should be disregarded. The trial court, however, omitted any reference to the other and very damaging statements made

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13 This Court laid down as a general rule in *Throckmorton* v. *United States*, 180 U. S. 552, 567, that withdrawing certain evidence from the consideration of the jury by a direction of the trial court will cure error which may have been committed by its introduction. However, the Court added a strong caveat that there may be instances where such a strong impression has been made upon the jury that a subsequent withdrawal will not cure the error. In several cases, this caveat has been adopted to reverse convictions where it could not be said from the record that no prejudice had resulted. *United States* v. *Sansone*, 206 F. 2d 86 (2d Cir.) (Trial Court waited 7 days to attempt to cure the error); *Pearson* v. *United States*, 192 F. 2d 681 (6th Cir.) (Trial Court waited 4 days); See also *Cullenger* v. *United States*, 50 F. 2d 345, 348-350 (7c); and *Mora* v. *United States*, 190 F. 2d 749, 751, 753 (5c).

to Agent Bailey by Randall, namely, that the petitioner stayed with co-conspirator Randall at the Secomber Hotel and registered under the alias and assumed name of Jack Parker (R. 261), and further that Randall had purchased the car under the assumed name of Robert White (R. 261). Moreover, the subsequent direction of the trial court to the jury to disregard the statements made by co-conspirators Brodsky and Randall at the time of their arrest with regard to either the substantive offense charged in Count 3 or the conspiracy charged in Count 6 did not eliminate from the jury's mind the fact that they could nevertheless consider the other damaging statements of co-conspirator Randall with regard to petitioner's guilt under Count 4, nor did it serve to recall just what the specific statements were.[14]

The inadmissible testimony of the co-conspirators made after their arrest to Special Agent Bailey was extremely damaging to the petitioner. Indeed, even the lower court in its opinion overlooked the inadmissibility of the statement of co-conspirator Randall that petitioner accompanied him in the car from New York to Miami, for it is set forth in the court's opinion as part of the evidence against petitioner in the case; much less could we expect from a jury told three days later to excise that fact from its mind in a case such as this. The inadmissible evidence as to petitioner's association with co-conspirators Randall and Brodsky; petitioner's registering with and living together

14 This is evident from the fact that in instructing the jury, the trial court did not segregate the evidence as to each of the separate conspiracies so that the jury was not made aware that evidence probative of one conspiracy might not be probative of the other conspiracy. Cf. *Kotteakos* v. *United States*, 328 U. S. 750.

with co-conspirators Randall under an assumed name; petitioner's riding in the automobile from New York to Miami with co-conspirator Randall were extremely prejudicial and of a nature which could very well have been the basis for petitioner's conviction on both conspiracies. This would appear from the fact that there does not seem to be a single bit of evidence in this record to sustain the conviction of petitioner on these conspiracies except his "association" with co-conspirators Randall and Brodsky. Petitioner had been acquitted of all substantive counts and the jury could easily, as it most likely did, equate proof of "association" as proof of conspiracy or agreement.[15]

It is appropriate in this regard to refer to the concurring opinion of Mr. Justice Jackson in *Krulewitch v. United States,* 336 U. S. 440, 453:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury * * * all practicing lawyers know to be unmitigated fiction * * *."

and further, at page 454:

> "It is difficult for the individual (co-defendant) to make his own case stand on its merits in the minds of jurors who are ready to believe that birds of a feather are flocked together * * *. There are many prejudicial difficulties in defending against the charge of conspiracy which I will not enumerate."[16]

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15 Convictions based upon such evidence were condemned in *United States* v. *Carengella,* 198 F. 2d 3, 7 (7th Cir.), cert. den. 344 U. S. 881; *United States* v. *Moloney,* 200 F. 2d 344 (7th Cir.).

16 Cf. *United States* v. *Di Re,* 332 U. S. 581, 593.

The lower court makes no mention of this point in its opinion. In holding that the judgment of the trial court was correct and should be affirmed under these circumstances, the lower court has sanctioned what is mere lip service to the general rule announced by this Court in *Throckmorton* v. *United States, supra.* However, in its practical operation and effect, the trial court failed utterly to remove the prejudice and damage that was caused petitioner by the inadmissible testimony of the statements by co-conspirators Randall and Brodsky.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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April, 1955

APPENDIX

Statutes Involved

§3052, Title 18, U. S. C.

"Powers of Federal Bureau of Investigation.

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony. As amended Jan. 10, 1951, c. 1221, §1, 64 Stat. 1239."

§371, Title 18, U. S. C.

"Conspiracy to commit offense or to defraud United States.

If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Statutes Involved

§2312, Title 18, U. S. C.

"Transportation of stolen vehicles.

Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 806."

Amendment IV to the Constitution of the United States

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Opinion

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14822

JEROME BRODSKY and JACK HAZELCORN, and ROBERT WHITE, a/k/a ROBERT RANDALL,

Appellants,

—versus—

UNITED STATES OF AMERICA,

Appellee.

Appeals from the United States District Court for the Southern District of Florida.

(December 29, 1954.)

Before HOLMES, BORAH, and RUSSELL, Circuit Judges.

HOLMES, Circuit Judge: This is an appeal by three defendants from a judgment of guilty on an indictment charging them with the substantive offense of transporting a motor vehicle in interstate commerce, and also with a conspiracy to violate the substantive offenses.

Each of the defendants was indicted on all of the six counts contained in the indictment. Count 1, charging

them with transporting the motor vehicle from New York City to Miami, Florida, with knowledge that it had been stolen, was dismissed as to defendants Jerome Brodsky and Jack Hazelcorn, but defendant Robert Randall was found guilty thereon. Count two was dismissed as to all defendants. Count three, charging all of the defendants with knowingly transporting the stolen vehicle in foreign commerce from Miami, Florida, to Havana, Cuba, was dismissed as to Hazelcorn, and the jury found defendants Randall and Brodsky guilty as therein charged. The remaining counts set forth a conspiracy to accomplish the substantive offenses. Under count four, the jury convicted Randall and Hazelcorn of a conspiracy to transport the stolen automobile from New York to Miami, and that count was dismissed as to Brodsky. Count five was dismissed as to all defendants. In count six, all of the defendants were charged with a conspiracy to transport the stolen motor vehicle from Miami to Havana with knowledge that it had been stolen, and the jury found all of the defendants guilty on this count. The primary question is whether there was sufficient evidence to support the several verdicts of the jury.

The uncontradicted evidence showed that the motor vehicle, a late model Cadillac, was stolen on March 30, 1953, in New York City. On April 3, 1953, the three defendants appeared at Orange Motor Company in Miami, Florida, and offered the stolen car for sale. There was evidence to show that Robert Randall, accompanied by Jack Hazelcorn, drove the car from New York to Miami. Randall, using the alias of White, represented himself to

be the owner of the stolen car, and presented as proof of ownership a forged title certificate containing fictitious business and residential addresses for himself; and the title certificate had on it a false registration number and false validating stamp. The evidence further showed that the motor number had been altered and that the identification tag had been partly destroyed. When the used car dealer noticed the unusual appearance of the motor number and other suspicious circumstances, he informed the defendants that he thought the car was a stolen one. The automobile dealer, in the presence of the defendants called the police to report the stolen car. The defendants drove away in the stolen car before the police arrived, and, as they were about to leave, the defendant Hazelcorn, using the alias of Parker, stated that they would return to New York to find the man from whom they had bought the car and get back their money.

Brodsky, a Miami Beach policeman, had previously brought cars to Orange Motor Company to be sold, and on each occasion was paid a commission. The evidence showed that he sent a telegram to New York on April 3rd inquiring as to the registration of the stolen car. This telegram was sent after he was told by the used car dealer that the car was stolen. A reply received on April 6th requested more information, since the registration of the car could not be checked on the information that he had furnished. Brodsky sent the information requested, but he did not await a reply to the second telegram before he commenced the alleged offenses. On April 6th, Randall and Brodsky bought round-trip tickets to Cuba, and also

purchased a one-way ticket for the stolen car. At the time the tickets were purchased, Randall claimed ownership of the car and made the necessary arrangements for its transportation. Brodsky, dressed in his police uniform, accompanied Randall to the loading dock and saw that the car was loaded upon the ferry.

The stolen automobile was seized in Cuba and shipped back to Miami by the American Consulate. When Randall and Brodsky returned to Miami from Havana, they were met at the airport and arrested. Shortly thereafter Hazelcorn was arrested in New York City. At the time of his arrest, he had on his person a copy of the telegram he had apparently sent to Brodsky, under the name of Allan Brodsky, stating: "Mother ill. Can you come." This telegram was sent in connection with Brodsky's alibi for being off from work on April 6th and thereafter. Brodsky's mother testified that she was not sick and did not have a son named Allan.

None of the defendants offered to testify. Brodsky offered two character witnesses, and Randall's wife testified on his behalf. She said that Randall bought the car for $2800 from some man known to her only as Charley. She did not know where this man could be located, and had not seen him since the alleged sale. From the facts and circumstances in evidence, the jury could fairly and reasonably infer, beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, the existence of the conspiracy charged in the indictment and the participation by the three defendants herein. The car was shown to have been stolen; the defendants were told

that it appeared to be stolen; and the actions of the defendants in regard thereto were not consistent with any hypothesis of innocence.

Hazelcorn contends that there was no evidence to connect him with either conspiracy, but we think that the jury could have inferred his connection with both of them from several facts. Hazelcorn was with the other two defendants when they attempted to dispose of the stolen car, and his statement to the car dealer that they would take it back and find the man from whom they had bought it tends to show that he was connected with the transportation of the car from New York to Miami. As to the conspiracy to transport the stolen motor vehicle to Cuba, he and Randall were registered at several hotels in Miami while Randall had the car with him, and the fact that the copy of the telegram was found on him after his arrest is certainly a connecting link that evidences his guilt of a criminal conspiracy. He was a participant in all of the activities with regard to the attempted sale of the stolen automobile, and, from the circumstances, the jury were justified in finding, beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, that he knew the car was stolen. Hazelcorn attacks the legality of his arrest, and contends that the incriminating evidence found on his person should be suppressed. The arrest being lawful, the search incident thereto was also lawful. The arresting officer had knowledge that the car was stolen; that Hazelcorn had accompanied Randall to Miami in the car; that he had received a telephone call from Havana; and that his wife sent money to a Bob White (Randall's

alias) in Havana. Furthermore, the agent was advised before the arrest that the United States Attorney had authorized the filing of a complaint against Hazelcorn. The arresting officer undoubtedly had reasonable cause to believe that the defendant had committed a felony. *Brubaker* v. *U. S.*, 188 F. (2) 894; *United States* v. *Bell*, 48 Fed. Supp. 986.

The evidence was also sufficient to support the verdict of the jury as to Brodsky. He was told by the automobile dealer that the Cadillac was a stolen automobile. Although he knew from the examination of the motor number by the used car dealer that the dealer thought the car had been stolen, and that the police were being notified, he failed to await the arrival of the police, but left the dealer's place and wired the motor vehicle bureau of New York, using the suspected number and not the altered number. The defendant received a reply from New York that he had not furnished sufficient information, and he proceeded to send the desired information, but he failed to await a reply to his telegram. He then got off from work on the false ground of his mother's illness, so that he could help transport the stolen car out of the country. All of these actions tend to exclude a reasonable hypothesis of innocence. Among his several assignments of error, he urges that the court erred in overruling his motion for a mistrial when the attorney for the United States, in his closing argument, stated: " * * * how does he explain what he was doing there? No explanation for those activities has been offered, and under the law the defendant is not required to come in here and testify, but from other

sources we have no explanation and I don't think we will get an explanation." The government's attorney argues that the statement complained of was inadvertently made, and that the trial judge emphatically instructed the jury that a defendant had an absolute privilege to testify or not, and that no inference might be drawn from his failure to do so. It is clear that no error was intentionally committed, since the attorney explained in his argument to the jury that he meant an explanation from other sources, such as cross-examination and examination of character witnesses, and not from the defendant himself; and, if an error was inadvertently committed, it was cured by the court and counsel, resulting in no harm to the appellants. In our opinion, the judgment was correct and should be affirmed.

AFFIRMED.

A True copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Fifth Circuit.

Judgment

Extract from the Minutes of December 29, 1954.

JEROME BRODSKY and JACK HAZELCORN, and
ROBERT WHITE, a/k/a ROBERT RANDALL,

No. 14822. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 700

JACK HAZELCORN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 578 Misc.

ROBERT WHITE, a/k/a ROBERT RANDALL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 533–539; Pet. App. 22–28) is reported at 218 F. 2d 145.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1954 (R. 540), and peti-

tions for rehearings were denied on February 18, 1955 (No. 700 R. 541–545; No. 578 Misc. R. 541–544). Mr. Justice Black extended the time for filing petitions for writs for certiorari until April 4, 1955, on which date the petitions were filed. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In No. 700:

1. Whether an F. B. I. agent had reasonable grounds for believing that petitioner had committed a felony, so that his arrest without a warrant and the incidental search of his person were legal.

2. Whether the court's charge adequately withdrew from the jury's consideration, as evidence against petitioner, statements made by two co-conspirators after termination of the conspiracy.

In No. 578 Misc.:

1. Whether an instruction regarding inferences of guilt from possession of recently stolen property limited explanation of legal possession to possible testimony by petitioner himself.

2. Whether remarks in a prosecutor's closing argument were prejudicial as referring to petitioner's failure to testify in his own defense.

STATUTES INVOLVED

18 U. S. C. 2312, 62 Stat. 806, provides:

> Whoever transports in interstate or foreign commerce a motor vehicle * * *, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U. S. C. 3052, 64 Stat. 1239, provides:

> The Director * * * and agents of the Federal Bureau of Investigation of the Department of Justice may * * * make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

STATEMENT

Petitioners were both convicted on two counts charging conspiracy to transport a stolen automobile in interstate commerce from New York to Florida, and to transport it in foreign commerce from Florida to Cuba. Randall, the petitioner in No. 578 Misc.,[1] was also convicted of the substantive offenses. Each of the petitioners was sentenced to two years on each count on which he was convicted, the sentences to run concurrently

[1] We shall refer to this petitioner by his real name, Randall, since that is how he was called in the court below, even though his present petition for certiorari is captioned Robert A. White, a/k/a Robert Randall.

(R. 2–6, 12–13, 35–36).[2] On appeal, the judgments were affirmed (R. 540).

Pertinent evidence adduced at the trial may be summarized as follows:

On March 30, 1953, a 1952 Cadillac automobile, which had been leased by a Detroit auto rental agency to one Weatherby, was stolen from the vicinity of 82d Street and East End Avenue in New York City (R. 69, 78, 80–83).

On April 3, 1953, the three defendants, with Hazelcorn using the alias Parker and Randall using the alias White, attempted to sell this Cadillac to a Miami automobile dealer named Molho (R. 100–102). The motor number of the car had been changed and the registration of ownership in the name of White had been forged (R. 108–109, 203–204). The car dealer told Brodsky, a Miami Beach policeman, that the automobile was "hot" and that he would have to call the police (R. 109). White (Randall) asked what would happen if the police came, and the dealer replied that the car would be taken away from him if it were stolen. Parker (Hazelcorn) suggested that if they went back to New York they might find the man, whose name they did not know, from whom they had bought the car. (R.

[2] A third defendant, Brodsky, was convicted of the conspiracy and substantive offenses relating to the transportation in foreign commerce and was sentenced to imprisonment for two years (R. 11, 41).

110, 111, 131–132.) The three men drove the car away before the police arrived (R. 109–110).

On April 6, there was sent to Brodsky from Brooklyn, New York, a telegram reading, "Mother ill. Can you come? Allan Brodsky, 7017 20th Avenue, Brooklyn, New York" (R. 327). Brodsky's mother testified at the trial that she did not know an Allan Brodsky, that she had nothing to do with sending the telegram, and that her health was good at that time (R. 334–335). Brodsky, relying upon his mother's spurious illness, did not work as a policeman on April 7, 8, and 9 (R. 317).

On April 6, Brodsky in his police uniform and Randall, posing as White, the purported registered owner of the Cadillac, sailed for Havana after a customs officer had approved the shipment of the car (R. 139–143, 177-178).[3]

Meanwhile, on the evening of April 3, the Miami Police Department had received a message to pick up Robert White and Jack Parker as suspects in the theft of the Cadillac (R. 306–307, 312). On April 10 at about 6:45 p. m., F. B. I. agents arrested Brodsky and Randall when they arrived at Miami on a plane coming from Cuba (R. 250).

At that time, Brodsky told F. B. I. agent Bailey that he had known Randall a number of years, and that Randall had said that he some-

[3] The stolen car was returned to Miami from Cuba on April 15, 1953 (R. 261–262).

times went under the name White (R. 258). Randall informed the agent that he had bought the Cadillac for $2,800 from a man named Charley in New York;[4] that he and Hazelcorn had "left New York with the automobile about April 1"; and that he had registered in the Seacomber Hotel in Miami as White, Hazelcorn as Parker (R. 259–261).

The circumstances of Hazelcorn's arrest in New York on April 10 are set forth in the Argument, *infra.*

ARGUMENT

I

No. 700

1. Petitioner Hazelcorn attacks on several grounds the validity of his arrest, and the search incident thereto. The circumstances were as follows:

In New York, on April 10, at about 8 p. m., two F. B. I. agents (Dyer and Van Lewen) went to the home of petitioner in Brooklyn to make an investigation (R. 346, 353, 361). At that time agent Dyer had received information that a phone call had been made from Havana, Cuba, to petitioner's residence, and that a money order had been sent in the name of his wife, Doris Hazelcorn, to Bob White in Havana (R. 353). The agent also knew that the Cadillac had been stolen

[4] Randall's wife gave testimony at the trial to this effect (R. 432–434).

and that there was a forged registration for it, although he did not know about petitioner's connection with the car (R. 360).

When petitioner arrived home at about 8:30 p. m., Dyer stated he wanted to talk to him at the F. B. I. office in connection with an official investigation. After petitioner said, "Well, can't we talk here?", Dyer explained that he had his files at the office. According to Dyer, petitioner voluntarily went along with him to the office (R. 353–354, 355).[5] At about 9:45 or 10:00 p. m., agent Dyer telephoned agent Bailey in Miami, stating that petitioner refused to answer any questions. Bailey told Dyer that Randall had already admitted that petitioner rode with him in the car to Florida, and that he (Bailey) was going to present the case to the United States Attorney for prosecution and call Dyer back (R. 357). Dyer understood that he was to hold petitioner until the return call (R. 358–359). When Bailey called back, he stated that, after presenting the matter to the United States Attorney, the latter had authorized filing of a complaint against petitioner (R. 359). Thereupon, Dyer placed petitioner under arrest, searched him, and took from him Government

[5] Petitioner testified on the hearing on the motion to suppress in the absence of the jury that he did not go voluntarily to the F. B. I. office and that he considered himself under arrest (R. 364).

Exhibits No. 29 (a copy of the telegram sent to Brodsky about his mother's being ill), No. 30 (a Seacomber Hotel, Miami, courtesy card, dated April 3), and No. 31 (an address of Albert's Motel in Miami, Florida). These exhibits were received in evidence over petitioner's objections, the court stating, in overruling a motion to suppress, that the arrest and therefore the search were lawful. (R. 349, 359, 365, 366–369.) The formal complaint and warrant of arrest against petitioner were issued on April 11, the day after the arrest by Dyer (R. 365).

a. Petitioner first argues that under 18 U. S. C. 3052, the F. B. I. agents had no authority to arrest him without a warrant in the absence of an emergency, even though they had probable cause to believe that he had committed a felony. However, as petitioner himself states (Pet. 10), the statute was amended in 1951, following the decision in *United States* v. *Coplon,* 191 F. 2d 749 (C. A. 2), certiorari denied, 342 U. S. 926, to eliminate the former proviso that arrests without a warrant could be made only if there was a likelihood of an escape before a warrant could be obtained. By the amendment, F. B. I. agents were given the same rights to make arrests as police officers generally have. This includes, in the statute's words, the right to arrest without a warrant upon "reasonable grounds to believe that the person to be arrested has committed" a felony. See *Carroll* v. *United States,* 267 U. S.

132, 156–7; *Trupiano* v. *United States,* 334 U. S. 699, 704.

b. He also contends (Pet. 14–15) that he was actually arrested when he was first asked to accompany the agents to the F. B. I. office, and certainly by the time Dyer decided to "hold" him pending a return call from agent Bailey in Miami. There was substantial testimony that petitioner voluntarily accompanied the F. B. I. agents to the office and that he was not under arrest at such time. But even if the initial action in requesting petitioner to come to the office could be considered an illegal detention, no search was made and no information leading to his subsequent arrest was supplied by petitioner. Consequently, even if there was an original illegal arrest, it may be disregarded as irrelevant; no "fruits" were obtained by such action. The search did not take place until later, after a lawful arrest.

c. Whether that arrest be deemed to have occurred when Dyer held petitioner after the first telephone call or when he formally arrested him after the second is immaterial since, at either time, Dyer clearly had reasonable grounds to arrest petitioner. Before the first telephone call Dyer knew that a car had been stolen and that there was a forged registration for it; that a telephone call had been made from Havana to petitioner's residence; that a money order had been sent in the name of petitioner's wife to Bob White in Havana (R. 353, 360). As a re-

sult of the telephone call, he learned that petitioner had driven with Randall (White) in the car to Florida (R. 357). The second telephone call to the effect that the United States Attorney had authorized the issuance of a complaint (R. 359) was a confirmation that in his judgment the known facts established probable cause to believe that petitioner had committed a felony. This conclusion was supported by the facts then available. Cf. *Brinegar* v. *United States,* 338 U. S. 160; *Brubaker v. United States,* 183 F. 2d 894, 897 (C. A. 6); *Mueller* v. *Powell,* 203 F. 2d 797, 802 (C. A. 8); *United States* v. *Bell,* 48 F. Supp. 986 (S. D. Cal.). Dyer, the arresting agent, could rely upon the summary information received from his fellow agent in Miami (*United States* v. *Bianco,* 189 F. 2d 716, 719 (C. A. 3)), even though some of the information the arresting agent had was hearsay. *United States* v. *Li Fat Tong,* 152 F. 2d 650, 652 (C. A. 2). And since the arrest was lawful, so also was the search of petitioner's person incident thereto. *United States* v. *Rabinowitz,* 339 U. S. 56, 60.

2. Petitioner urges that the trial court erred in admitting in evidence statements of his coconspirators Randall and Brodsky after the conspiracy had ended, and in failing to give adequate withdrawal instructions to the jury in regard to these statements (Pet. 15–19).

This question arises in the following context. Over petitioner's objections, agent Bailey was

permitted to testify at the trial as to admissions made by Randall and Brodsky after their arrest on April 10, 1953 (R. 257). Brodsky admitted his presence with the other two defendants at Miami on April 3 in connection with the attempted sale of the Cadillac (R. 257–258); Randall admitted that he had obtained the registration of the car in the name of Robert White, that he and petitioner had left New York about April 1 and that he had acquired the car about two days before that, and that petitioner had registered as Jack Parker at the Seacomber Hotel with him at a time when he (Randall) used the alias White (R. 260–261).

In its final charge to the jury regarding count 4 (the first conspiracy count), the court instructed as follows (R. 505–506):

> In this connection the Court wishes to at this time instruct the jury on the issue of whether [petitioner] was guilty of the conspiracy charged, that you should disregard and accord no probative force to the testimony of the Government witness Bailey that the accused Randall made a statement to him, Bailey, that [petitioner] accompanied him, Randall, on the trip from New York to Miami, since it is the law that acts and declarations of co-conspirators are not admissible against the other members of the conspiracy after the termination of the conspiracy itself.

> In other words, the jury could not consider the testimony upon the issue of whether there was in fact a conspiracy between Randall and [petitioner] or whether there was an overt act in pursuance of such conspiracy since the conspiracy, if any there was, was terminated when the defendant Randall was arrested and the object of the conspiracy, if any, was thereby necessarily terminated; * * *.

Also in the final charge the court instructed regarding count 6 (the second conspiracy count) (R. 511):

> The Court instructs you that such testimony of the Government witness Bailey as bears upon statements made by the defendant Brodsky and the defendant Randall at the time of their arrest the jury would not be authorized to, and you are instructed not to, consider or give any probative force to any statement made by either of said accused to the witness Bailey in the absence of the other accused, either on the substantive offense charged in Count 3 or the conspiracy charge in Count 6.

In the circumstances of this case, this charge adequately instructed the jury not to consider the admissions by Brodsky and Randall in relation to petitioner. Cf. *Pennsylvania Co.* v. *Roy,* 102 U. S. 451, 458–459; *Hopt* v. *Utah,* 120 U. S. 430, 438; *Metzler* v. *United States,* 64 F. 2d 203, 207–208 (C. A. 9). Although the charge referred

specifically only to the admission by Randall that petitioner had accompanied him on the trip in the Cadillac from New York to Miami (the most damaging admission against petitioner), it was not an indispensable requirement that all other admissions be mentioned. The charge as a whole emphatically told the jury that any admissions by Brodsky and Randall after their arrest and termination of the conspiracy were not evidence against petitioner. Indeed petitioner's attorney, at the conclusion of the court's charge, did not raise the objections now advanced (R. 518–520), and was presumably satisfied with the charge. See Rule 30, F. R. Crim. P. In *Krulewitch* v. *United States,* 336 U. S. 440 (relied on at Pet. 15–16), there was no withdrawal instruction to cure the error in admitting a statement by a co-conspirator against the accused made long after the termination of the conspiracy.

There was evidence, other than these admissions, from which the jury could properly have inferred—and in all probability did infer—petitioner's guilt under the conspiracy counts. His presence in Miami was proved by the Seacomber Hotel courtesy card and the car dealer Molho's testimony, which also showed his participation in the conspiracy. Molho said that petitioner, using the alias Parker, was present when the three defendants tried to sell him the stolen Cadillac, and that after being informed that the

car was "hot", petitioner said that "if they went back to New York with the car they might find the man from whom they bought it" (R. 100–102, 110, 111). There was also the spurious telegram to Brodsky, which the jury could infer petitioner had sent from Brooklyn, indicating active assistance to the others beyond mere association with them. In the face of this evidence and the judge's clear withdrawal charge, petitioner cannot complain about the admissions.

II

No. 578 Misc.

1. Over objection of petitioner Randall (R. 519–520), the judge gave the following instruction (R. 507):

> * * * it is a rule of evidence that where one is found in possession of recently stolen property, the jury may infer as a matter of fact that the possessor is the thief unless he gives a reasonable and credible explanation of his possession, but if such explanation is sufficient to raise a reasonable doubt, then the inference of guilt is overcome.

Petitioner argues that this instruction erroneously led the jurors to believe that an explanation of legal possession had to come only from petitioner himself, and that they were precluded from considering any other evidence in the case tending to show legal possession (Pet. 8–9). This

contention is negated by the part of the charge immediately after that challenged (R. 507):

> The jury will recall the statement attributed to [petitioner] by the Government witness Molho to the effect that he [petitioner] had purchased the automobile in New York for the price of $2,800.00. You also have before you the testimony of the wife of [petitioner] in explanation of [petitioner's] possession of the automobile to the effect that [petitioner] purchased the automobile from Charlie for the price of $2,800.00. Of course if the jury believe the testimony of Mrs. Randall to be true, then [petitioner] could not be guilty of any offense, nor could either of the other defendants be guilty.[6]

The jurors, moreover, were instructed to weigh the testimony of "all the witnesses" (R. 508), and consider "all the evidence" in the case (R. 515, 516).

2. In his closing argument the government prosecutor referred to defendant Brodsky's being absent from the police force without leave, the sending of the spurious telegram about his mother's illness in New York, and his going to Havana after things got "pretty hot" in Miami

[6] See, also, the part of the charge (R. 511–512) where the jury were told that if they believed petitioner's explanation to Molho as to possession of the car and the testimony of petitioner's wife were not true, they could consider this in connection with the possible inference of guilt arising out of possession of recently stolen property.

(R. 496). The prosecutor continued (R. 496–497):

> The character references here say his character is good, but if his character is good how does he explain what he was doing there? No explanation for these activities has been offered and under the law the defendant is not required to come in here and testify, but from other sources we have no explanation and I don't think we will ever get an explanation.

Defendant Brodsky's motion for a mistrial, in which motion petitioner joined, was overruled (R. 497–499).

Petitioner contends that the prosecutor's remarks, in alluding to his failure to take the stand, constituted prejudicial error (Pet. 9–10). But, taken as a whole, this was not a comment on a defendant's failure to testify but, rather, an observation on the total lack of pertinent defense. And, in any event, there was no derogatory reference in this closing argument to petitioner's failure to take the stand, since the prosecutor was speaking not about him, but about defendant Brodsky. The part of the prosecutor's remarks about there having been no explanation from "other sources" was certainly not improper, since it plainly did not refer to the failure of an accused to testify. Cf. *Gargotta* v. *United States,* 77 F. 2d 977, 978 (C. A. 8); *Rinella* v. *United States,* 60 F. 2d 216, 218 (C. A. 7).

Moreover, the judge in his final charge gave comprehensive instructions (R. 513–514) to the effect that all the defendants had a legal right to testify or not, as they chose, and that their failure to testify could not be considered as evidence of guilt or weigh against the presumption of innocence. Cf. *Baker* v. *United States,* 115 F. 2d 533, 544 (C. A. 8), certiorari denied, 312 U. S. 692.

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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